a. The court of appeals correctly identified this Court's test for determining whether a Fourth Amendment seizure of property has occurred. The Court repeated in *Jacobsen* the same test that it had established in earlier cases, that is, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." 466 U.S. at 113 & n.5. Contrary to the views of petitioner (Pet. 9-15) and the dissenting judges of the court of appeals (Pet. App. 29a-30a), *Jacobsen* did not equate that test with a simple "dominion and control" standard, nor is the decision below inconsistent with the result reached in *Jacobsen*.

At issue in *Jacobsen* was a package that had been sent via a private courier, and that had already been examined by Federal Express employees and found to contain a suspicious white powder. When Federal Express agents notified the Drug Enforcement Administration of their discovery and invited them to examine the package, a federal agent proceeded to remove the four plastic bags from the opened package and to use a small amount of white powder from each bag to field-test the substance, which proved to be cocaine. 466 U.S. at 111-112. The Court, without any extended analysis, stated that "the agents' assertion of dominion and control over the package and its contents" constituted a "seizure," though not an unreasonable one, in light of their prior knowledge that the package apparently contained "contraband and little else." *Id.* at 120-121 (citing, *inter alia*, *Texas* v. *Brown*, 460 U.S. 730, 743 (1983) (plurality opinion)). The Court also concluded that the field test was a further seizure because it destroyed some of the powder and therefore permanently deprived the owner of his possessory interests as to that small

amount of the drugs; that seizure, too, the Court concluded, was a reasonable one in light of its de minimis impact. *Id.* at 124-126.

As the court below correctly recognized (Pet. App. 12a), the *Jacobsen* Court did not use two different tests for the seizure determination; rather, the Court meant to describe the agents' initial actions as having satisfied the "meaningful interference" test. Federal Express employees, having discovered what they thought to be contraband, relinquished control of Jacobsen's package to the law enforcement agents, who immediately did more than merely examine the outside or move the package briefly; rather, the first agent proceeded to open it and examine its contents with a law enforcement purpose. In those circumstances, the agents were already interfering with the owner's possessory interests—an interference that became permanent once the agents actually destroyed a trace amount of the contraband inside to conduct a field test of the substance.

The court of appeals correctly understood that *Jacobsen* was applying the "meaningful interference" test at both points. By focusing on three factors (Pet. App. 20a)—the impairment of the traveler's freedom of movement, delay in timely delivery of the luggage, and deprivation of the carrier's custody of the luggage—the court of appeals was not formulating a new test, but simply providing useful guidelines for application of this Court's seizure standard to the particular situation of checked luggage, mindful that not every police interference with private property constitutes a seizure, but only those interferences that are "*meaningful*." *Id.* at 19a.

The conclusion of the court below that the luggage in this case was not seized is consistent with *Jacobsen*.

Significantly, the bus company here did not relinquish all control over the bag. Unlike the Federal Express employees in *Jacobsen*, who invited federal agents to take charge of the package and its apparent contraband, the bus company in this case in no way ended its bailment of the luggage entrusted to it for transportation to the traveler's destination. To the contrary, investigators here acted as they did because Greyhound still controlled the luggage. Greyhound preferred to have passengers and police discuss the checked luggage somewhere away from the refueling bus. Pet. App. 2a, 22a. The agent did not take the bag into law enforcement custody; he merely had it moved to the bus terminal's baggage room, where the passenger could decide whether he would consent to its search. And unlike the package in *Jacobsen*, the luggage here was not opened by the agents and the contents examined before the owner had consented.[3]

b. As the court of appeals noted (Pet. App. 19a-21a), its decision is consistent with that of every other federal court of appeals to examine the question whether law enforcement actions constitute a Fourth Amendment seizure of checked luggage. The Fifth, Seventh, and Ninth Circuits have all reached similar conclusions. In *United States* v. *Lovell*, 849 F.2d 910 (5th Cir. 1988), border patrol agents, seeing a nervous airline passenger check two pieces of luggage, removed the luggage from the baggage conveyor belt, compressed the bags' sides and smelled marijuana. The agents then detained the bags and, after a positive alert by a drug detection canine, they obtained a search warrant. The court of ap-

[3] Petitioner does not challenge in this Court the court of appeals' conclusion (Pet. App. 23a-27a) that he voluntarily consented to the search.

peals noted that the defendant had surrendered his luggage to a common carrier, with the expectation that he could reclaim his bags at his destination. The court then concluded that in the absence of any delay in his travel or in the expected delivery of the suitcase, the "momentary delay occasioned by the bags' removal from the conveyor belt was insufficient to constitute a meaningful interference with [defendant's] possessory interest in his bags." *Id.* at 916.

The Ninth Circuit followed the approach of *Lovell* in *United States* v. *Brown*, 884 F.2d 1309 (1989), cert. denied, 493 U.S. 1025 (1990). In that case, an airline passenger was acting suspiciously and narcotics detectives arranged to have his checked luggage held while they spoke to him. He eventually consented to a search of the luggage he was carrying and the bags he had checked; the checked luggage contained two kilograms of cocaine. The court of appeals found no seizure in the "brief diversion of [the defendant's] suitcases from their journey to the cargo hold," reasoning that there was no meaningful interference with his possessory rights when neither his own travel nor his expectations concerning the luggage he had surrendered to a common carrier were frustrated. *Id.* at 1311. See *United States* v. *Johnson*, 990 F.2d 1129, 1132-1133 (9th Cir. 1993) (no seizure when officers, with the permission of the airline, removed checked luggage from the tarmac, where it had missed its owner's flight, to airline terminal for dog sniff because the "entire process * * * was completed prior to the time the luggage would have been placed on the [next] airplane").

The Seventh Circuit used the same analysis in *United States* v. *Ward*, 144 F.3d 1024 (1998), where the court held that removal of a checked bag from the lug-

gage compartment of a bus did not amount to a seizure. Consistent with the court of appeals' decision here, the Seventh Circuit held that "[t]he earliest point at which the bag was seized in the Fourth Amendment sense" was when the officer "interrupted the bag's transport" by holding the bag for a dog sniff despite the departure of the bus. *Id.* at 1033.

Like the decision below, each of these cases applied the test from *Jacobsen*—whether a meaningful interference with possessory interests occurred—and each case focused on the expectations about checked luggage as a way to determine whether the owner's possessory interests had been meaningfully affected. Contrary to petitioner's claim (Pet. 17-21), there is no confusion among the courts on how to determine whether a seizure has occurred when checked luggage is briefly detained or otherwise handled.

c. Nor is there any conflict with state appellate cases involving luggage or packages that are detained for investigative purposes. In *State* v. *Ressler*, 701 N.W.2d 915 (N.D. 2005), for example, a shipping company employee discovered a large amount of currency in a suspicious package and called the police, who took the package to a law enforcement center for a canine sniff. The North Dakota Supreme Court held that, although police had reasonable suspicion to detain the package for further investigation, transporting it to a completely different place for a canine sniff was an unreasonable seizure. *Id.* at 921-922. The finding of a seizure is consistent with both *Jacobsen* and the decision below; the clerk's relinquishment of the package to police for their investigation would have qualified as a seizure under the third prong of the court of appeals' test in this case. The same reasoning explains the other cases upon which pe-

titioner relies (Pet. 18-19). See *People* v. *Ortega*, 34 P.3d 986, 992 (Colo. 2001) ("officer exercised control over defendant's property"); *People* v. *Shapiro*, 687 N.E.2d 65, 68, 70-71 (Ill. 1997) (package removed from the mail stream and shipped from Chicago to St. Louis for investigation); *People* v. *McPhee*, 628 N.E.2d 523, 529-530 (Ill. App. Ct. 1993) (police detective removed envelope from Federal Express facility and locked it in his police car pending a dog sniff); *State* v. *LaSalla*, 536 So. 2d 1037, 1038 (Fla. Dist. Ct. App. 1988) (per curiam) (police removed suitcase from the airline's possession).[4]

---

[4] Petitioner also asserts (Pet. 19-20) that the courts have caused confusion by sometimes requiring reasonable suspicion for any detention of personal effects in transit, applying this Court's holding in *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). Unlike the brief detention in this case, however, in that case and in the lower court cases cited by petitioner, the package in question was removed from the stream of mail and (as petitioner acknowledges, see Pet. 21 n.10) held for a significant time (29 hours in *Van Leeuwen*) by law enforcement authorities for further investigation. See *United States* v. *Robinson*, 390 F.3d 853, 870 (6th Cir. 2004) (detention of package for "a few hours" for exposure to drug-sniffing dog was justified by reasonable suspicion); *United States* v. *Dennis*, 115 F.3d 524, 531-533 (7th Cir. 1997) (detention of mailed package for less than 48 hours for dog sniff and obtaining of warrant justified by reasonable suspicion); *United States* v. *Glover*, 104 F.3d 1570, 1575-1577 (10th Cir. 1997) (detention of mailed package for one day justified by reasonable suspicion); *United States* v. *Banks*, 3 F.3d 399, 401-403 (11th Cir. 1993) (per curiam) (delay of mailed package for less than one day for dog sniff and warrant justified by reasonable suspicion), cert. denied, 510 U.S. 1129 (1994); *United States* v. *Aldaz*, 921 F.2d 227, 231 (9th Cir. 1990) (delay caused by transferring packages to Anchorage was reasonable and justified by reasonable suspicion), cert. denied, 501 U.S. 1207 (1991). The fact that the courts in those distinguishable cases concluded that investigatory detentions were justified by reasonable suspicion does not demonstrate confusion in the lower courts in cases such as this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

MAY 2006

(2)

No. 05-1628

FILED
JUN 5 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KEITH A. VA LERIE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

JAMES MARTIN DAVIS
Davis Law Offices
1623 Farnam Street, No. 500
Omaha, NE 68102
(402) 341-9900

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

JAMES E. RYAN
DANIEL R. ORTIZ
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903

June 5, 2006

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

A. This Case Is An Entirely Appropriate Vehicle For Resolving The Issue 1

B. The Conflict of Authority Concerning The Meaning of Seizure Is Real, Serious, and Entrenched 4

C. The Lower Courts' Noncompliance With The Holding of *Jacobsen* Supports Certiorari 7

D. *Jacobsen*, Not the Lower Court's Test, Is Correct As A Matter of Fourth Amendment Law ... 9

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Abney v. United States, 431 U.S. 651 (1977) 4

Agostini v. Felton, 501 U.S. 203 (1997) 8

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 5

Bates v. United States, 522 U.S. 23 (1997) 2

California v. Hodari D., 499 U.S. 621 (1991) 10

Central Bank of Denver, N.A. v. First Interstate Bank,
511 U.S. 164 (1994) 2

Jacobsen v. United States,
466 U.S. 109 (1984) . . . . . *passim*

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,
526 U.S. 344 (1999) 2

Oliver v. United States, 466 U.S. 170 (1984) 2

Solorio v. United States, 483 U.S. 435 (1987) 2

United States v. Glover, 104 F.3d 1570 (10th Cir. 1997) . . 6

United States v. Grubbs, 126 S. Ct. 34 (2005) (Mem.) 2

United States v. Hernandez,
313 F.3d 1206 (9th Cir. 2002) 7

United States v. Lovell,
849 F.2d 910 (5th Cir.1988) 6, 7

United States v. Morones,
355 F.3d 1108 (8th Cir. 2004) 5

United States v. Place, 462 U.S. 696 (1983) 7

United States v. Van Leeuwen, 347 U.S. 249 (1970) 7

United States v. Virginia, 518 U.S. 515 (1996) 3

United States v. Ward,
144 F.3d 1024 (7th Cir.1998) 6

STATE CASES

Colorado v. Ortega, 34 P.3d 986 (Colo. 2001) 9

Florida v. LaSalla, 536 So.2d 1037 (Fla. App. 1989) 9

North Dakota v. Ressler,
701 N.W.2d 915 (N.D. 2005) 4, 5, 6

Virginia v. Hurley, 548 S.E.2d 266 (Va. App. 2001) 6

OTHER MATERIALS

Stern, Gressman, et al., SUPREME COURT PRACTICE
(8th ed. 2002) 2

Reply Brief for the United States, *United States v. Philip Morris USA, Inc.* (No. 05-92)
(September 2005) 2, 4

Petition for Certiorari, *United States v. Grubbs*
(No. 04-1414) (April 2005) 5

REPLY BRIEF FOR PETITIONER

The decision below, by a sharply divided en banc court, resolved a basic, recurring question concerning the meaning of the Fourth Amendment in a manner that conflicts with the decisions of numerous other courts, including the highest court of an Eighth Circuit State; with the precedent of this Court that all twelve judges below recognized to be controlling; and with fundamental Fourth Amendment principles.

The Brief in Opposition does not gainsay the importance of the seizure issue, and it is conspicuously devoid of any effort to defend the lower court's rule as correct as a matter of constitutional principle. Rather, the Government confines its response to (1) a claim that this case's interlocutory posture makes it an inappropriate "vehicle" for addressing the question and (2) assertions that the many decisions the Petition identified as conflicting with the Eighth Circuit's rule – including *Jacobsen* – are distinguishable on their facts.

But simply declaring the case law "consistent" does not make it so. The disagreement and confusion among the lower courts as to when the Fourth Amendment's prohibition on unreasonable seizures attaches is real and serious, and the failure to follow *Jacobsen* is likewise widespread. In view of the clarity with which the issue is presented here and the serious practical consequences of allowing these conflicts to persist, review is plainly warranted.

A. This Case Is An Entirely Appropriate Vehicle For Resolving The Issue

The seizure issue is, largely as a result of the Government's litigation choices below, presented with pristine clarity in this case. In the appeals court, the Government declined to seek reversal of either the district court's finding that the agents lacked "reasonable suspicion" to seize the garment bag or its holding that evidence obtained through the subsequent *search* was inadmissible unless the initial seizure were valid. See Opp. 4 n.2. Instead, the Government, expressly authorized by the

Solicitor General, focused the appeal – and the en banc rehearing – on what it means for property to be "seized" for purposes of the Fourth Amendment.[1] The record bearing on that question has been pored over by the full Court of Appeals.

The Solicitor General nevertheless asserts (Opp. 7) that this case is not a proper "vehicle" for addressing the issue. Because the decision below was rendered on an interlocutory appeal, the Government submits, review is not warranted "at this time," *id.*[2]

The Government of course does not dispute that this case is within this Court's certiorari jurisdiction, nor do the Court's cases suggest anything remotely like an inflexible bar. The U.S. Reports are replete with cases exercising review of appellate decisions remanding for further proceedings, see, *e.g.*, *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999); *Central Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164 (1994), including many in the precisely same posture presented here. See, *e.g.*, *Oliver v. United States*, 466 U.S. 170 (1984) (granting review of *en banc* decision reversing suppression order); *Solorio v. United States*, 483 U.S. 435 (1987); *Bates v. United States*, 522 U.S. 23 (1997). As the Solicitor General observed earlier this Term, "this Court frequently grants review of interlocutory court of appeals decisions that would qualify for review except for their non-final posture," Reply Br., *United States v. Philip Morris USA, Inc.* (No. 05-92) at 7; see also *United States v. Grubbs*, 126 S. Ct. 34 (2005) (Mem.) (granting Government's petition to

[1]The Government also appealed the finding that the search was nonconsensual – but, as all recognize, favorable resolution of that question is of no value to the Government if the agents' actions in taking control of the bag are held to have been a seizure.

[2]Although the Government (Opp. 7) quotes from the Stern and Gressman treatise to support its claim that efficiency considerations support denying review – because Mr. Va Lerie could yet be acquitted (or raise the seizure issue in a later appeal) – it fails to make clear that the quoted words appear in a sentence describing what the "the Solicitor General has maintained" when opposing review, Stern et al., Supreme Court Practice at 258 n.59 – a position that has not always prevailed. See *infra*.

review decision remanding criminal case for further proceedings).

Although there undoubtedly are strong reasons to withhold review when interlocutory decisions resolve issues closely intertwined with ones that will be subject to further litigation – *e.g.*, a decision on a summary judgment record that will be fleshed out at trial – or where issues of liability and remedy are sensibly considered together, *United States v. Virginia*, 518 U.S. 515 (1996), that is not at all the case here. The seizure question is entirely separate from the factual issues of guilt and innocence that would be the subject of Mr. Va Lerie's criminal trial – and the substantial attention that question has received from the courts below is all they will devote to it.

Indeed, the question is presented with unusual clarity and salience here in part *because of* the case's posture. Although government actions like this one are surely ubiquitous, the seizure issue seldom receives thorough examination: in some cases, disputed evidence will be held admissible on some independent basis, and in others, the facts would establish that the property was detained upon "reasonable suspicion" Here, the Government, recognizing of the importance of having the circuit court settle the threshold issue, disavowed any alternative basis for upholding the agents' actions.[3]

And other considerations strongly *favor* deciding the issue "at this time." The "absolutely critical" need, highlighted in the panel dissent, for the public and law enforcement understand what the Fourth Amendment requires in these circumstances, see Pet. App.88a, has become much more urgent now that the question has received definitive, but irreconcilable, answers from the Eighth Circuit and a State Supreme Court within that Circuit. See *infra*.

Nor is there any merit to the suggestion that efficiency would

[3]Of course, in many instances, the issue will be pretermitted entirely by a guilty plea – and in cases where no contraband is found, the property owner may never become aware of the government's actions.

be served by "postponing" review. Given the district court's rulings (and the Government's litigation choices), there is a significant likelihood that favorable resolution of the seizure issue here would bring this case to an end. By contrast, the Government proposes a trial – in which Mr. Va Lerie would have to meet the constitutionally doubtful evidence, followed (in the event of a conviction) by an appeal, in which the Eighth Circuit would be confined to deciding questions *other than* the seizure issue (while aware that this Court might yet decide that dispositive question in Mr. Va Lerie's favor). Such an appeal, if successful, might result in further trial proceedings – and, presumably, new claims that the seizure question should wait.

And it plainly is not a matter of indifference to Petitioner whether the important question of constitutional law his case raises is addressed "at this time" or reserved until the indefinite future. Accepting that the Government's appeal and pursuit of en banc review were not undertaken for the *purpose* of delay, these protracted proceedings have imposed heavy burdens on Petitioner, and it is fair, as well as sensible, to now finish what the Government has started – and postpone trying Mr. Va Lerie until after the seizure issue is settled, rather than require him to run the gauntlet of a gratuitous trial, see *Abney v. United States*, 431 U.S. 651 (1977). Cf. Reply Br. for U.S., No. 05-92 at 6 (urging the Court to reject claim of "[r]espondents, who initiated the interlocutory review process, * * * that this Court should not grant review 'at this interlocutory stage'").

B. The Conflict of Authority Concerning The Meaning of Seizure Is Real, Serious, and Entrenched

As the Petition documented, the disagreement and confusion that impelled the Eighth Circuit to hear this case *en banc* is evident in the decisions of other courts, a number of which have expressly rejected the rule adopted below. See Pet.16-21. For purposes here, the most important of these is *Ressler*, in which a Supreme Court of an Eighth Circuit State, after carefully setting out the conflicting approaches, embraced the rationale

of the Eighth Circuit's decision in *United States v. Morones* – a decision the *en banc* court in this case declared would "no longer [be] controlling precedent," Pet.App.9a n.3.

1. As this Court's cases reflect, such conflicts are generally a compelling ground for granting review, because State courts are not bound to follow lo al Circuit court decisions on questions of federal law, see *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997). But the prospect of conflicting interpretations within the same jurisdiction is especially intolerable – and the need for this Court's intervention even stronger – in the circumstances presented here: because "prosecutions in federal court * * * often result from investigations conducted at the state or local level," Pet., *United States v. Grubbs* (No. 04-1414) at 22, the very same law enforcement actions will be subject to fundamentally different interpretations of the federal Constitution, depending on the court in which charges are filed. See *id.* (urging review of interlocutory decision on that basis).[4]

The Government responds, fairly remarkably, that *Ressler* presents no conflict because (it asserts) the Eighth Circuit would also find a seizure on the facts of that case. See Opp.12. But the dispositive point is this: had the court below *followed the Ressler court's rule, it would have found a seizure – and an unreasonable one – in Mr. Va Lerie's case*. See Pet.App. 77a (Melloy, J., concurring) (recognizing that finding of seizure was required by *Morones* line); *id.* 81a (Riley, J., dissenting) (agreeing that *Morones* would support seizure finding, but maintaining that panel could follow a different line of cases).

Moreover, while *Ressler* did involve a package that police "transport[ed] to a completely different place," Opp. 12, the constitutional significance the *Ressler* court assigned to that fact is essentially the opposite of what the Government implies.

[4]Here, a central theme of the Nebraska police's interrogation was that Mr. Va Lerie could be prosecuted in either federal or State court – and that federal charges would be filed unless he renounced his invocation of his right to consult an attorney. See Pet.App. 67a n.3.

After concluding (in plain disagreement with the reasoning below) that a brief investigative detention *is* a seizure within the meaning of the Fourth Amendment, the North Dakota Supreme Court held that the police's actions in relocating the package placed Ressler's case outside the class of detentions that could be justified by "reasonable suspicion," rather than probable cause. 701 N.W.2d at 922.

2. The Government's assurance (Opp. 12-13) that the decision below is "consistent" with the decisions of the Sixth, Tenth, and Eleventh Circuits (among others) identified in the Petition (at 19-21) is no more reliable.

The Petition documented that these courts have held that a seizure occurs – and the Fourth Amendment's reasonableness requirement attaches – when law enforcement agents briefly detain property entrusted to a carrier, see, *e.g.*, *Glover*, 104 F.3d at 1576 – and have done so without addressing any of the three factors the court below identified as constitutionally indispensable, including in cases where it is apparent that none of them was present. See, *e.g.*, *Hurley*, 548 S.E.2d at 269. Application of this rule to Mr. Va Lerie's case would also be undeniably outcome-altering.

The Government, after devoting nearly three pages (Opp. 9-11) to showing that the decision below is in accord with the very Fifth, Seventh, and Ninth Circuit opinions *the Eighth Circuit majority said it was following*, makes its entire response to these *conflicting* decisions in one footnote (Opp. 13 n.4), in which it suggests that they are reconcilable with the Eighth Circuit's rule based on the "significant amount of time" the defendants' property was detained.

That is just not so. First, the length of detention is not a factor that has independent significance in the Eighth Circuit's seizure test (or in those of *Lovell* and *Ward*) – all of which emphasize that delays in repossession are what matters. Even more important, none of the *cited* decisions treats the length of government possession as bearing on whether a seizure

occurred. Rather, they discuss the subject in addressing an entirely distinct Fourth Amendment principle – that even a detention justified at its inception may ultimately become unreasonable, see *Place*, 462 U.S. at 709. See, *e.g.*, *Hernandez*, 313 F.3d at 1212 ("Even if the initial seizure of a mailed package is based on reasonable suspicion, a prolonged detention is unreasonable under the Fourth Amendment").[5]

C. The Lower Courts' Noncompliance With The Holding of *Jacobsen* Supports Certiorari

However consistent the decision below may be with ones of the Fifth, Seventh, and Ninth Circuits, the Petition (following the lead of the closely-reasoned dissenting opinion) showed that these decisions all proceed from a fundamental misreading of this Court's authoritative decision in *Jacobsen*. While courts treating delay in repossession as the *sine qua non* of seizure have invoked this Court's "possessory interest" language, see *Lovell*, 849 F.2d at 916, as the basis for their rule, it is simply impossible to describe a test that treats absence of delay in delivery or travel as fatal to a seizure claim as "consistent" with the *holding* of *Jacobsen* – which found property seized, without any delay in possession or impairment of travel.

The Government does not elaborate on its contrary claim (Opp. 12) that such decisions "applied the test from *Jacobsen*"; indeed, it asserts, ominously, that the result in *Jacobsen* was reached without "any extended analysis," Opp. 8. But the relevant holding is clear enough to understand and apply: "the decision by governmental authorities to exert dominion and

[5]As the Petition acknowledged (at 21), there *is* a feature common to many of the cases that recognize brief investigatory detentions as seizures: they often involve, as did *Van Leeuwen*, property entrusted to the Postal Service or some other delivery service, rather than effects (such as checked luggage) accompanied in transit by their owner. But far from suggesting a principled Fourth Amendment distinction, this observation only highlights the extent to which seizure case law has lost its way. In view of universal recognition that detaining unaccompanied packages raises *less* Fourth Amendment concern, see Pet.20, it makes no sense at all to employ a *more* protective definition of seizure in such cases.